92-625

NO. (1)

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1992

MR. AND MRS. HENRY A. PLAISANCE, JR.
Petitioners

versus

TEXACO, INC. AND
CROSBY MARINE SERVICE, INC.
Respondents

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

1) Does a seaman have a "cause of action" for unseaworthiness and negligence under the General Maritime Law for emotional injuries suffered without physical impact?

2) Does the rule adopted by the United States Court of Appeals for the Fifth Circuit, i.e. "recovery is permitted in a negligence action for inflection of serious emotional distress where a reasonable person, normally constituted, would not be able to cope adequately with the mental distress occasioned by the circumstances," 937 F.2d 1010, require a factual determination by a trier of fact or may the Judge apply the rule as a matter of law?

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OPINIONS BELOW

The initial decision with written reasons by the United States District Court for the Eastern District of Louisiana is by "Minute Entry" dated January 26, 1990 and is unreported and appears at App. A, infra p.p. A-1 with the Judgment dated January 29, 1990. The ruling on plaintiffs' Motion for New Trial is by "Minute Entry" dated March 7, 1990 and is unreported and appears at App. B, infra p.p. A-8.

The first opinion of the United States Court of Appeals for the Fifth Circuit is reported at 937 F.2d 1004 and appears at App. C, infra p.p. A-11; rehearing en banc was ordered and is reported at 954 F.2d 266 and appears at App. D, infra, p.p. A-32; and, finally, the second opinion of the United States Court of Appeals for the Fifth Circuit is reported at 966 F.2d 166 and appears at App. E, infra p.p. A-34.

JURISDICTION

The judgment of the District court was entered on January 29, 1990, (App. A, infra p.p. A-1). The plaintiffs' Motion for New Trial was denied with written reasons on March 7, 1990 (App. B, infra p.p. A-8). The first opinion of the United States Court of Appeals for the Fifth Circuit was rendered on August 9, 1991 reported at 937 F.2d 1004 and appears at App. C, infra p.p. A-11. The rehearing en banc was ordered by the Court's own motion on February 11, 1992 and is reported at 954 F.2d 266 and appears at App. D, infra p.p. A-32. The second opinion of the United States Court of Appeals for the Fifth Circuit was rendered on July 14, 1992, is reported at 966 F.2d 166 and appears at App. E, infra p.p. A-34. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254 (1).

STATEMENT OF THE CASE

Henry Anthony Plaisance and Joyce Plaisance brought this action against Mr. Plaisance's employer, Crosby Marine Service, Inc., under the Jones Act and General Maritime Law for unseaworthiness of the tug to which he was assigned and against Texaco, Inc. under the General Maritime Law for unseaworthiness of its vessel, the spud barge in tow, and negligence, for damages for injuries sustained on or about January 29, 1989 while he was assigned to the M/V TOMMY CROSBY as a captain. Crosby Marine Service, Inc. has paid maintenance to date but has not paid all medical expenses to date.

Texaco, Inc. and Crosby Marine Service, Inc. filed a Motion to Dismiss Pursuant to Federal Rules of Civil Procedure 12(b)(6) or for Partial Summary Judgment moving for dismissal of claims for emotional injury stating that plaintiffs did not state a cause of action under the Jones Act or under the General Maritime Law. Statements setting forth the facts in dispute were filed by all parties supported by affidavits and depositions taken up to that time. (Discovery had only started as the suit had been filed a few months before the motions were filed.) The District Court without oral argument granted the motion to dismiss as a matter of law.

The District Court granted the motion to dismiss for failure to state a cause of action as a matter of law because the facts were in dispute.

In the interim the Louisiana Supreme Court decided the case of *Lejeune v. Rayne Branch Hospital*, 556 So.2d 559 (La. 1990) wherein the Louisiana Supreme Court reversed prior jurisprudence and permitted recovery for emotional injuries absent physical trauma. For this

reason and others, plaintiffs filed a motion for new trial alleging that this could have a bearing on the claim for unseaworthiness and negligence under the General Maritime Law because if there was no applicable federal maritime law the District Court could consider State law pursuant to *Atchison, T. & S.F.R. Co. v. Buell*, 480 U.S. 557, 107 S.Ct. 1410, 94 L.Ed.2d 563 (1987). This motion was submitted without oral argument and denied with written reasons by the District Court.

Plaintiffs appealed to the United States Court of Appeals for the Fifth Circuit. After oral argument, the Fifth Circuit issued its opinion found at 937 F.2d 1004 wherein the Fifth Circuit, after considering the action of all the other circuits and the different approaches taken by various state courts, adopted the full recovery rule wherein "recovery is permitted in a negligence action for infliction of serious emotional distress where 'a reasonble person, normally constituted, would not be able to cope adequately with the mental distress occasioned by the circumstances.' " 937 F.2d 1010.

The fifth Circuit concluded from disputed facts that Plaisance should have been "able to cope adequately with the mental distress occasioned by the circumstances."

Plaintiffs filed a Motion for Rehearing. Subsequently, the Fifth Circuit on its own motion ordered a rehearing en banc. After the rehearing en banc, the Fifth Circuit issued a second opinion (966 F.2d 166) wherein it reaffirmed its first opinion.

STATEMENT OF THE FACTS

Henry Plaisance was born and raised in Cut Off, Louisiana, is fifty-three years of age, has an eighth grade education, has been married once to Joyce Plaisance and they have five children. He has been working as a tug captain for thirty years and for his present employer, Crosby Marine Service, Inc., for ten years.

Texaco, Inc. owned a spudded workover barge on which it installed trailer-type buildings for living quarters and a tool house. Texaco hired a workover crew from Best Workover, Inc. to pull tubing from old wells around Caillou Island, Terrebonne Parish, State of Louisiana. The standby tug was the TOMMY CROSBY, operated by plaintiff. An additional tug, in this case the VIRGIE CENAC owned by Cenac Towing, was occasionally used to move the Texaco workover barge from well site to well site. Texaco kept representative, Henry Prejean, on the job to oversee and coordinate the work. All personnel received their instructions from Henry Prejean, the Texaco representative.

On January 29, 1989, Henry Prejean instructed the tugs TOMMY CROSBY and VIRGIE CENAC to relocate the workover barge from one wellhead to another. The distance between the wellheads was about one-half mile.

The flotilla was set up with the tug TOMMY CROSBY in the lead, then the workover barge, followed by the tug VIRGIE CENAC tied to the stern of the workover barge.

Henry Plaisance claims that he advised the Texaco representative, Henry Prejean, to take a different route but was ordered to take the most direct route to the new well

site.

As the flotilla proceeded, one of the spuds on the workover barge (it was later determined the spud could not be raised so its foot was flush with the bottom of the workover barge), hit a gas line on the water bottom which resulted in an explosion and a fire aboard the workover barge *and* the tug VIRGIE CENAC, with considerable damage to the tug.

After the fire started, Henry Plaisance backed the tug TOMMY CROSBY to the bow of the workover barge and the workover crew and the crew of the VIRGIE CENAC boarded the tug TOMMY CROSBY.

Other vessels came to the location of the fire to assist the flotilla.

Thereafter, the flotilla proceeded to Texaco's camp at Caillou Island. At that point the Texaco representative ordered Henry Plaisance to proceed to the Texaco fuel dock in the vicinity and to fill the fuel tanks on the TOMMY CROSBY. Henry Plaisance was then instructed to dock the TOMMY CROSBY next to the workover barge and to transfer diesel from the tanks of the TOMMY CROSBY to the fuel tanks of the workover barge.

During this process, diesel fuel was spilled on the deck of the TOMMY CROSBY by the mate and/or Texaco representative, and Henry Plaisance slipped on the deck striking his back and head.

Thereafter, Henry Plaisance and the TOMMY CROSBY were ordered to tow the workover barge to Cocodrie, Louisiana for repairs to the spud.

At Cocodrie, Henry Plaisance asked to be relieved and was taken to Our Lady of the Sea Hospital where he was treated for three days and was then transferred to Bayou Oaks, a psychiatric hospital in Houma, Louisiana. There he came under the care of Dr. D. F. Carlos, a psychiatrist, and was hospitalized for thirty days.

Dr. Carlos testified that Henry Plaisance is suffering from post-traumatic disorder and depression wherein Henry Plaisance perceived that he and the other men could have been burned or killed.

As of this time, Henry Plaisance is still under psychiatric care and his care is being paid for by his employer and he is receiving maintenance.

ARGUMENT

The District Court held as a matter of law that plaintiffs failed to state a cause of action. The judgment reads:

> "IT IS ORDERED, ADJUDGED AND DECREED that Judgment be entered herein in favor of Defendants, Texaco, Inc. and Crosby Marine Service, Inc., dismissing Plaintiffs' claims in their entirety since Plaintiffs' Complaint does not allege a cause of action upon which relief can be granted."

The District Court had to so find to dismiss the case because the facts of the accident and degree of injury were disputed and each side submitted affidavits and depositions which put the facts of the case at issue.

The Fifth Circuit held plaintiff-appellant, Plaisance,

had a cause of action under the Jones Act for a purely emotional injury absent physical trauma and then, pursuant to their "New Rubric" or "rule" held that "the injury complained of was not a reasonably foreseeable consequence of the alleged negligence" (937 F.2d 1004) and affirmed the District Court's dismissal.

In this case the Fifth Circuit could not apply its "rule" to the "disputed" facts in the record so the Fifth Circuit decided the facts:

> "Applying the rubric we adopt today to the facts of the case at bar, we find that the district court appropriately dismissed the complaint. The injury complained of is not a reasonably foreseeable consequence of the alleged negligence. One would not reasonably expect a normally constituted seaman, much less a senior, very experienced tugboat captain, to have the emotional reaction alleged by Plaisance who, objectively assessed, was not threatened by the fire. Further, fires in the oilfield and the flaring of gas were not unusual sights and the other crews were not placed in significant danger. Indeed, the crews of the barge and accompanying tugboat quickly moved to the safety of Plaisance's vessel, which Plaisance placed directly against the barge without being so ordered and without comment. It was a smooth, nigh routine maneuver lasting only a few minutes. It was not until many hours later, and only after he allegedly slipped and fell on spilled fuel on his deck that Plaisance asked to be relieved. Our conclusion is buttressed by the observation of the treating psychiatrist who testified that he was baffled by Plaisance's overall reaction. We share that bafflement."

As to the general maritime claims for unsea-

worthiness against the employer, Crosby Marine Service, Inc. and Texaco, Inc. and the general maritime claim for negligence against Texaco, Inc. the Fifth Circuit held at page 1006, footnote 1:

> "In light of our ultimate disposition of the Plaisance claims, we need not resolve the parallel question whether the general maritime law would permit recovery for purely emotional injury."

These actions by the Fifth Circuit raise the following questions. The Jones Act is a negligence statute and the General Maritime Law is suppose to be a living, breathing, body of law. It is hornbook law that a plaintiff may prevail under one or both theories, and that the law under each claim is *different* with *different standards.* Does the same "New Rubric" or "rule" established by the Fifth Circuit apply to the unseaworthiness claim under the General Maritime Law against Crosby Marine Services, Inc. and Texaco, Inc. and/or the negligence claim under the General Maritime Law against Texaco, Inc.? It would seem from the opinions that the "rule" under the Jones Act has to be the same for the claims made under the General Maritime Law and, if not, then what is the "rule" for a claim under the maritime law for unseaworthiness and negligence and can Plaisance prevail?

It would seem that the "rule" calls for a conclusion of fact not law. If Plaisance does have a "cause of action," then who decides if the injury complained of is not a reasonably foreseeable consequence of the alleged negligence - a Judge as a matter of law or the finder of fact?

Plaisance was ordered to tow a barge in a shallow bay with hundreds of gas lines buried years ago. These lines belong to Texaco, Inc. The barge being towed was

owned by Texaco, Inc. Isn't it foreseeable, if the barge's spuds are not positioned properly, the spuds could hit a gas line and cause an explosion? Any reasonable person would have to say "yes."

Then, if there is an explosion, might some of the seamen be affected differently than others, and could some suffer a purely emotional injury due to the circumstances of the accident, which could lead a seaman to believe he was in danger of burning or being killed? Any reasonable person would have to say "yes."

The Fifth Circuit "buttressed" its opinions with the "observation of the treating psychiatrist," whose name is not given, who allegedly testified he was "baffled" by Plaisance's overall reaction. Is this a finding of fact?

Plaisance has been sent to other psychiatrists, who were not chosen by either side to this litigation, who found Plaisance is totally disabled. In fact, Social Security has found Plaisance totally disabled as a result of this injury.

Hasn't the Fifth Circuit in essence granted "summary judgment" or prejudged the case without hearing all the evidence? This motion was filed early in the litigation and Plaisance was never given the opportunity to present a witness list, expert or formal testimony. Is this "rule" to be applied by District Courts as a matter of law or is the test a mixed question of fact and law, and shouldn't the finder of fact decide the case?

If Plaisance has stated a cause of action under the Jones Act, should this case have been remanded to give Plaisance an opportunity to prove his case?

This case sets a new precedent for Jones Act cases.

The Judge as a matter of law has the right to apply the "New Rubric" or "rule" to the facts and decide "if the injury complained of is a reasonably foreseeable consequence of the alleged negligence." One would have to assume that based upon the background of a District Judge a particular plaintiff may or may not prevail. Until now questions of reasonable consequence or causation was left to the trier of the facts and not the Judge, unless, of course, the case was tried to a Judge without a Jury.

Decisions of Circuit Courts should help litigants by providing succinct answers to the issues and not leave the litigants with more unresolved issues than when they started. This decision does not provide any answers but more questions.

We would respectfully ask the Supreme Court to decide:

1) Whether or not a seaman may recover for a purely emotional tort based on an unseaworthiness claim under the General Maritime Law.

2) Whether or not a seaman may recover for a purely emotional tort based on negligence under the General Maritime Law.

3) If a seaman has a cause of action for a purely emotional injury under the Jones Act, is the "New Rubric" or "rule" a question to be decided by the finder of fact or by the court as a matter of law?

CONCLUSION

In *Buell, supra*, the Supreme Court indicates that the lower federal courts should look to common law or state law. The law of Louisiana does allow recovery for emotional injury absent physical trauma. Had this suit been filed in the State Courts of Louisiana plaintiff would have had a cause of action under maritime law and could have had the case tried by a jury.

The federal courts are the mother of maritime law in this country and this Court should set the standard for the lower federal and state courts to follow.

Respectfully submitted:

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit on Behalf of Petitioners, Mr. and Mrs. Henry Plaisance, Jr., has been furnished all counsel of record on this 7th day of October, 1992.

_____

JOSEPH J. WEIGAND, JR.

APPENDIX A

MINUTE ENTRY
McNAMARA, J.
JANUARY 26, 1990

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

FILED
JAN 30 90

MR. AND MRS. HENRY ANTHONY PLAISANCE, JR.	*	CIVIL ACTION
VERSUS	*	NO. 89-2645
TEXACO, INC. AND CROSBY MARINE SERVICES, INC.	*	SECTION: "D" (5)

Before the court is the Motion of Defendants, Texaco, Inc. and Crosby Marine Service, Inc., to Dismiss Certain Claims pursuant to Fed. R. Civ. P. 12(b)(6), or for Partial Summary Judgment. Plaintiffs, Mr. and Mrs. Henry Anthony Plaisance, Jr., oppose this Motion. The Motion, set to be heard on Wednesday, January 24, 1990, is before the court on briefs, without oral argument.

Defendants move this court to dismiss Plaintiffs' claims that are attributable to emotional injury, arguing that Plaintiffs have not stated a cause of action under

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either the Jones Act or under general maritime law. The seminal case on this issue is *Gaston v. Flowers Transp.*, 866 F. 2d 816 (5th Cir. 1989), which considered a seaman's action to recover for mental anguish resulting from watching his half-brother being crushed to death between two vessels. The court held that the seaman who did not show that he reasonably believed he was in actual physical danger when the accident occurred, could not recover under the Jones Act for mental anguish. The court examined the legislative history of the Jones Act, and concluded that "even a liberal interpretation of the Jones Act [does not require] extending recovery to those who suffer purely emotional injury." *Id.* at 817.

The Fifth Circuit decision of *Hagerty v. L. & L Marine Services, Inc.*, 788 F. 2d 315 (5th Cir. 1986), however, allowed a plaintiff to recover for emotional injuries "from fear of developing cancer where his fear [was] reasonable and causally related to the defendant's negligence." *Id.* at 318. The plaintiff in *Hagerty* was drenched in cancer-causing chemicals. The actual physical impact in *Hagerty* differentiated that plaintiff's claim from the claim before the *Gaston* court. The *Gaston* plaintiff never feared for his own safety, and did not experience a physical tort that was causally related to his claim of emotional injury.

The *Gaston* court was concerned about extending liability to situations of a bystander's emotional reactions for two reasons. First, the court noted that allowing this type of recovery "would represent a major departure from existing jurisprudence, as well as a vast extension of potential employer exposure to damages." 866 F. 2d at 819. Second, the court found "something incongruous" in allowing this type of recovery for seamen since "[t]hese [persons] have knowingly and voluntarily chosen callings which, while today perhaps not fairly termed dangerous, yet do in-

volve braving certain hazards and are traditionally not well suited to the squeamish or fainthearted." *Id.* at 820. The court concluded, therefore, that allowing such a recovery is a decision that would be more appropriately left for the legislature. *Id.*

The court also considered whether Mr. Gaston could recover for finding himself in a "zone of danger." *Id.* The court noted that while Louisiana law allows for such a recovery, Gaston made no showing that he ever thought himself to be in danger. As such, the court did not decide the issue. In concluding, the court limited its holding as follows:

> We do not hold today that no recovery can be had under the FELA/Jones Act for a purely emotional injury resulting from actions directed against the plaintiff or an occurrence that happened to him. That fact situation is not presented today. But whatever merit allowing recovery for purely emotional injury may have or may lack, we see none in allowing mere crewmen-bystanders to recover for witnessing the misfortune of another. *Id.* at 821.

In the instant litigation, Mr. Plaisance's claim is distinguishable from both *Hagerty* and *Gaston.* Unlike the *Hagerty* plaintiff, Plaisance did not experience any actual physical impact. Mr. Plaisance's claim is distinguishable from the *Gaston* claim, however, because Plaisance perceived himself to be in actual danger. Plaintiff witnessed a fire while working as the captain of the tug TOMMY CROSBY. The fire was extinguished, the TOMMY CROSBY was not damaged, and no one was injured as a result of the fire. Plaintiff did not participate in fighting the fire, and persons on other vessels in the vicinity of the fire escaped the fire by going to the vessel upon which Plaisance was working. Objectively, therefore, plaintiff did not seem to be in a

"zone of danger" during the fire.

While the record contains no evidence that Plaintiff was actually in danger during the fire, he nevertheless perceived himself to be in danger. In his deposition, Plaintiff reported that he asked to be relieved from his duties because he was upset about the accident. Plaintiff stated that he was disturbed "[t]hat we could have all burned and all. That's what I told him, you know, that I could have all—blew them up and all, you know...Well, that we could have all burned, you know, with the fire." Deposition, p. 106. Plaintiff alleges that he still dreams about the accident. He reported, "I see that [in his dreams]—the fire, you know. Those men running, you know. Running on my boat and all." Deposition, p. 110.

The facts of this case reveal that Mr. Plaisance's situation is more closely analogous to the *Gaston* decision rather than the situation in *Hagerty*. Plaintiff suffered no physical impact which led to his alleged emotional injury. Instead, Plaintiff claims injury only as a result of watching the fire. Nobody was injured in the blaze, Plaintiff's vessel was not damaged, and Plaisance did not undergo the trauma of watching someone else being seriously injured. Moreover, Plaintiff was not, objectively, in a zone of danger. Plaintiff, However, perceived himself to be in actual physical danger during the fire. While the reasonableness of Plaintiff's fear is ultimately a fact question, this court's reading of *Gaston* indicated that a plaintiff's subjective belief that he was in danger, standing alone, is probably insufficient to give rise to a cause of action for emotional injury under the Jones Act. In addition, Plaintiff cites no authority which indicates that a seaman can recover for a purely emotional injury under the general maritime law. Since the court is unaware of any authority in this regard, the court finds that Plaintiffs do not state

a viable cause of action under the general maritime law.

Since the court concludes that Plaintiffs have not stated a viable cause of action for emotional injury in this matter, the court finds that this lawsuit should be dismissed in its entirety. Defendants' Motion only seeks to dismiss Plaintiffs' claim for damages as a result of witnessing the fire, stating that Defendants will challenge Plaisance's right to receive maintenance and cure, as well as Plaintiffs' claim for damages resulting from an alleged slip and fall that occurred approximately two hours after the fire incident. The court notes that Plaintiffs' complaint does not make a claim for maintenance and cure. It is well-settled that a seaman has the right, under the general maritime law, to recover maintenancce and cure irrespective of the negligence or fault of his employer unless the injury was brought about by his own willful misbehavior. Martin J. Norris, The Law of Seaman §678 (3d. ed. Supp. 1984). Here, however, there is no claim for maintenance and cure before the court.

Regarding Mr. Plaisance's alleged slip and fall, this incident is also not pled in Plaintiffs' complaint, and it is not causally related to the fire. After the fire had been extinguished, the flotilla proceeded to Texaco's camp at Caillou Island. At that point the TOMMY CROSBY stopped at the Texaco fuel dock in order to fill its fuel tanks. Mr. Plaisance docked the tug next to the workover barge to transfer fuel from the tanks of the TOMMY CROSBY to the workover barge. During the process, diesel fuel was spilled on the deck of the tug, and Mr. Plaisance allegedly slipped and fell, landing on his back and head. This accident occurred at least two to three hours after the fire incident. Plaisance did not record his alleged slip and fall on the boat log, nor on the handwritten accident report which he signed after the accident. Moreover, he did not report

this incident to anyone from Crosby or Texaco.

The court finds no connection between the fire and the slip and fall. Plaisance's deposition does not allege any connection between the incidents, and Plaintiffs' memorandum in opposition to Defendants' Motion does not indicate that the two accidents are connected in any way. The court's own analysis of the record does not reveal any causal link between the accidents. The slip and fall is not related in terms of time, location, or circumstances to the fire. Accordingly, since the slip and fall has not been pled separately, the court holds that this issue is not properly before the court at this time.

Accordingly, IT IS ORDERED that Defendants', Texaco, Inc. and Crosby Marine Services, Inc., Motion to Dismiss Certain Claims Pursuant to Fed. R. Civ. P. 12 (b) (6), or for Partial Summary Judgment, should be and is GRANTED dismissing Plaintiffs' complaint in its entirety since the court finds that Plaisance's other potential causes of action have not been pled and are therefore not properly before the court. Judgment will be entered accordingly.

* * * *

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

FILED
JAN 30 90

MR. AND MRS. HENRY ANTHONY PLAISANCE, JR.	*	CIVIL ACTION
VERSUS	*	NO. 89-2645
TEXACO, INC. AND CROSBY MARINE SERVICES, INC.	*	SECTION: "D" (5)

J U D G M E N T

In accordance with this court's Minute Entry dated January 26, 1990;

IT IS ORDERED, ADJUDGED AND DECREED that Judgment be entered herein in favor of Defendants, Texaco, Inc. and Crosby Marine Services, Inc., dismissing Plaintiffs' claims in their entirety since Plaintiffs' Complaint does not allege a cause of action upon which relief can be granted.

New Orleans, Louisiana, this 29th day of January, 1990.

/s/ Illegible

UNITED STATES DISTRICT JUDGE

DATE OF ENTRY JAN 31 1990

APPENDIX B

MINUTE ENTRY
McNAMARA, J.
MARCH 7, 1990

MAR 12 1990

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

FILED
MAR 8 90

MR. AND MRS. HENRY ANTHONY PLAISANCE, JR.	*	CIVIL ACTION
VERSUS	*	NO. 89-2645
TEXACO, INC. AND CROSBY MARINE SERVICES, INC.	*	SECTION: "D" (5)

Before the court is the Motion of Plaintiffs, Mr. and Mrs. Henry Anthony Plaisance, Jr., for a New Trial. Defendants, Texaco, Inc. and Crosby Marine Services, Inc., oppose this Motion. The Motion, set to be heard on Wednesday, March 7, 1990, is before the court on briefs, without oral argument.

Plaintiffs argue that the court's decision to dismiss this matter was in error for several reasons. First, Plaintiffs contend, based upon *Gaston v. Flowers Transportation*, 866 F. 2d 816, 820 (5th Cir. 1989), that the determina-

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tion of whether Plaisance was in a zone of danger is a fact question. The *Gaston* decision does not definitely state whether it is a judge or jury question, but this court holds that it is ultimately a question of law.

Plaintiffs also argue that the new Louisiana Supreme Court case, *Lejeune v. Rayne Branch Hospital*, No. 89-CC-0575, February 5, 1990, changes the law that is applicable to this case. Plaintiffs' contention fails for two reasons. First, jurisdiction in this matter is based upon the Jones Act and the General Maritime Law; thus, Louisiana law is not controlling, even though a district court can look toward state law for guidance. *Gaston*, 866 F.2d at 820. Second, *Lejeune* is clearly distinguishable from Plaisance's situation. The *Lejeune* decision allows a plaintiff-bystander to recover damages for emotional injury when a plaintiff witnesses an injury to some victim or witnesses damage occurring as a result of an accident to some victim, so long as the plaintiff-bystander had a close relationship with the victim injured by the physical trauma. In contrast, Plaisance claims damages for emotional injury solely from watching a fire. Nobody was injured, and there is no evidence to indicate that either Plaisance or someone related to him was in actual danger from the fire.

Finally, Plaintiffs argue that the unseaworthiness remedy allows recovery for a bystander's emotional injury. Plaintiffs insist that the *Gaston* decision, which expressly disallows such a remedy, is in error since the case *Sosa v. M/V Lago Izabel*, 736 F.2d 1028 (5th Cir. 1984), allows a plaintiff to recover for mental anguish accompanying a physical trauma. Plaintiffs' contention is in error since the *Sosa* decision only allowed recovery for mental anguish as part of a pain and suffering award that accompanied a physical injury.

Accordingly, IT IS ORDERED that Plaintiffs', Mr. and Mrs. Henry Anthony Plaisance, Jr., Motion for a New Trial, should be and is DENIED.

* * * *

APPENDIX C

Mr. & Mrs. Henry PLAISANCE, Jr.
Plaintiffs-Appellants,

v.

TEXACO, INC. et al.,
Defendants-Appellees.

No. 90-3183.

United States Court of Appeals,
Fifth Circuit.

Aug. 9, 1991.

Tugboat captain and spouse brought action seeking to recover for alleged emotional injury that resulted from witnessing fire. The United States District Court for the Eastern District of Louisiana, 735 F.Supp. 686, A.J. McNamara, J., dismissed claims. Captain and spouse appealed. The Court of Appeals, Politz, Circuit Judge, held that: (1) claim for negligently inflicted emotional injury is cognizable under Federal Employers' Liability Act (FELA) and Jones Act, even without accompanying physical injury or contact, and (2) captain's emotional injury was not reasonably foreseeable consequence of alleged negligent rupturing of underwater gas line and causing fire and, therefore, was not recoverable.

Affirmed.

Edith H. Jones, Circuit Judge, concurred in part, dissented in part, and filed opinion.

Before POLITZ, WILLIAMS, and JONES, Circuit Judges.

POLITZ, Circuit Judge:

Today we determine whether there can be recovery under the Jones Act for a purely emotional injury. Concluding for the reasons assigned that such recovery is permissible, but that the claims of appellants herein factually do not qualify, we reach the same result as did the district court, and affirm its dismissal.

Background

Henry A. Plaisance, Jr. had over 30 years experience as a tugboat captain, the last 10 of which had been in the employ of Crosby Marine Service, Inc., when, on January 29, 1989, he allegedly sustained a significant emotional injury as a result of an allision with an underwater gas line. On that date Plaisance was operating the tug TOMMY CROSBY, towing a workover barge from one well location to another in Louisiana coastal waters. The TOMMY CROSBY was under contract to Texaco, Inc. A second tug, the VERGIE CENAC, was tied to the rear of the barge. Apparently one of the barge's spuds projected below its bottom and came in contact with an underwater-4-inch gas pipeline. The pipeline ruptured, the gas escaped, and an explosion and fire ensued.

The TOMMY CROSBY had a relatively short tow line. Plaisance immediately backed up to the barge and the workers on the barge and the crew of the VERGIE CENAC quickly moved to the safety of the TOMMY CROSBY. The

tow was disconnected and the TOMMY CROSBY was taken a short distance off. It was immediately apparent that the fire was confined to the rear of the barge and the front of the trailing tug; the tether lines between the two burned and separated and the VERGIE CENAC began to drift. Upon instructions from the Texaco supervisor aboard, Plaisance reconnected the tow lines, pulled the barge away from the rupture site and spudded it in place. The fire was then extinguished by the combined crews aided by the crews of other vessels which were attracted by the fire. The entire operation took less than 30 minutes.

No one was injured by the explosion or fire. The flotilla (the two tugs and the barge) then proceeded to the nearby Texaco camp, the barge was spudded and the TOMMY CROSBY went to a Texaco fuel dock in the vicinity to get a load of diesel for transfer to the barge. The fuel was transferred and the barge was then towed in for repairs. Several hours later, upon arriving at the repair dock, Plaisance asked to be relieved of duty because he did not feel well.

Plaisance first went to a local hospital for a few days and then transferred to a psychiatric hospital where he remained for 45 days. According to the treating psychiatrist, Plaisance was suffering from post-traumatic stress disorder and depression resulting from his perception that he and the others could have been injured or killed in the explosion and fire. As of the time of the disposition in the trial court, Plaisance continued to receive periodic psychiatric care and continued to express an inability to return to work.

Plaisance and his wife filed the instant personal injury action, invoking the Jones Act, 46 U.S.C.App. § 688, and general maritime law against Crosby, and general

maritime law against Texaco, claiming total disability from an emotional injury. Defendants moved to dismiss the claims as not being cognizable under either the Jones Act or general maritime law. The district court agreed and dismissed the Plaisance claims, 735 F.Supp. 686. They timely appealed.

Analysis

[1] The Plaisances seek recovery under the Jones Act[1] for a purely emotional injury. The Jones Act, and its underlying statutory structure, the Federal Employers' Liability Act, 45 U.S.C. §§ 51 *et seq.*, are silent as to whether injuries, within their meaning, include an injury which is entirely mental. Appellees contend that our recent decision in *Gaston v. Flowers Transp.*, 866 F.2d 816 (5th Cir.1989), forcloses this inquiry. It does not. *Gaston* was a bystander case and we very carefully noted its limitations, stating:

> We do not hold today that no recovery can be had under the FELA/Jones Act for a purely emotional injury resulting from actions directed against the plaintiff or an occurrence that happened to him.

Id. at 821. In the case at bar Plaisance alleges an occurrence that happened to him. We therefore here address an issue of first impression for our court.

The Supreme Court recently considered the issue of recovery for purely emotional injuries under the FELA in *Atchison, T. & S.F.R. Co. v. Buell*, 480 U.S. 557, 107 S.Ct. 1410, 94 L.Ed.2d 563 (1987), but declined to decide

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[1] In light of our ultimate disposition of the Plaisance claims, we need not resolve the parallel question whether the general maritime law would permit recovery for a purely emotional injury.

whether the FELA permitted such claims. The Court, did, however, opine that

> [t]he question whether "emotional injury" is cognizable under the FELA is not necessarily an abstract point of law or a pure question of statutory construction that might be answerable without exacting scrutiny of the facts of the case. Assuming, as we have, that FELA juris-prudence gleans guidance from common law developments, whether one can recover for emotional injury might rest on a variety of subtle and intricate distinctions related to the nature of the injury and the character of the tortious activity.... In short, the question whether one can recover for emotional injury may not be susceptible to an all-inclusive "yes" or "no" answer. As in other areas of law, broad pronouncements in this area may have to bow to the precise application of developing legal principles to the particular facts at hand.

Id. at 568, 570, 107 S.Ct. at 1417, 1418 (citations omitted). The Supreme Court thus left open the question whether one may recover for purely emotional injuries under the FELA, suggesting that the federal courts consult the common law for guidance. *Buell*, 480 U.S. at 568, 107 S.Ct. at 1417; *Gaston*, 866 F.2d at 820. We do so, mindful that "[w]hat constitutes negligence for the statute's purpose is a federal question, not varying in accordance with the differing conceptions of negligence applicable under state and local laws for other purposes." *Urie v. Thompson*, 337 U.S. 163, 174, 69 S.Ct. 1018, 1027, 93 L.Ed. 1282 (1949); *see also Dice v. Akron, C. & Y.R. Co.*, 342 U.S. 359, 72 S.Ct. 312, 96 L.Ed. 398 (1952).

The comments by the Supreme Court in *Buell* generally have been viewed as an open invitation to the

lower federal courts to explore the possibility of recovery under the FELA for a purely emotional injury. *Moody v. Maine C.R. Co.*, 823 F.2d 693 (1st Cir.1987). Other than the Ninth Circuit in the underlying *Buell* decision, 771 F.2d 1320 (9th Cir.1985), and its progeny, *e.g., Taylor v. Burlington Northern Railway Co.*, 787 F.2d 1309 (9th Cir.1986), no circuit has as yet so ruled. We previously have brushed against the edges but have not dispositively addressed this issue.

We first considered the matter in *Hagerty v. L & L Marine Servs., Inc.*, 788 F.2d 315 (5th Cir.1986), wherein the plaintiff sought recovery for his fear of developing cancer as a result of being soaked with toxic chemicals. The district court granted defendant a summary judgment stating that Hagerty had no cause of action because he had not sustained a physical injury. We reversed, seizing on the fact that Hagerty had been doused with the toxic chemicals and, as a result, temporarily had experienced dizziness, leg cramps, and a stinging sensation in his extremities. We found a cause of action. In remanding, we stated that Hagerty's "present fear or anxiety due to the possibility of contracting cancer constitutes a present fact of mental anguish and may be included in recoverable damages." *Id.* at 317. Although we declined to decide whether emotional injuries alone could serve as basis for recovery, in dicta we indicated support for the proposition. We first noted that the Jones Act was "intended to provide coverage for all work-related 'injuries,' whether characterized as mental or physical." *Id.* at 318. We then criticized the negligence rules limiting recovery for emotional distress to claims accompanied by a physical injury or physical impact, stating that these rules were unrealistic and provided dubious mechanisms for objectively assuring that an alleged mental injury was not feigned. "With or without physical injury or impact, a plaintiff is entitled to

recover damages for serious mental distress arising from fear of developing cancer where his fear is reasonable...." *Id.* at 318.

We next considered the matter in *Netto v. Amtrak*, 863 F.2d 1210 (5th Cir.1989), where the plaintiff based his FELA claim on a nervous breakdown which allegedly resulted from either deliberate harassment or negligent treatment by the employer. The trial court indicated a willingness to permit recovery under the FELA for purely emotional injuries but granted summary judgment to the defendant because Netto had failed to make the required showing of unconscionable abuse or outrageous conduct.[2] On appeal we affirmed on the ground advanced by the trial court. In doing so we declined to decide if an FELA plaintiff may recover for purely emotional injuries.

In our most recent foray, *Gaston v. Flowers Transportation*, the plaintiff sought Jones Act and general admiralty law recovery for the emotional injury he suffered as a result of seeing his half-brother crushed to death between two vessels. We rejected the argument that *Hagerty* provided the basis for recovery for a purely emotional injury. Rather, we noted that while *Hagerty* "did observe that a Jones Act recovery was possible without physical impact, that statement was necessarily dictum; for Mr. Hagerty did suffer impact, having been drenched with cancer-causing chemicals." 866 F.2d at 819. *Gaston* interpreted *Hagerty* as leaving open the question whether a purely emotional injury is recoverable under the Jones Act. Further, and of greater importance, we observed that "Hagerty's recovery was one ... based on an event directly

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[2] The trial court only addressed Netto's claim for intentional infliction of emotional distress and not his claim for negligent infliction of emotional distress. Netto did not present this latter claim on appeal; we did not address it. *Netto*, 863 F.2d at 1214 n. 4.

affecting *him*. In today's case, Mr. Gaston seeks recovery for a bystander injury that resulted from witnessing the death of *another*." *Id.* at 819. We indicated that even if we were to permit recovery for purely emotional injuries, we would not do so in the bystander context.[3] Finally, we rejected Gaston's zone of danger claim because Gaston did not make a showing that he thought himself to be in danger. We expressly noted, however, as quoted above, that we were not barring recovery under the Jones Act "for a purely emotional injury resulting from actions directed against the plaintiff or an occurrence that happened to him." *Id.* at 821.

Although presented with these opportunities, we previously have not resolved the question whether the FELA permits recovery for purely emotional injuries. Our colleagues in the First, Third, Fourth, Sixth and Seventh Circuits similarly have declined the *Buell* invitation.

In *Moody v. Maine Cent. R. Co.*, 823 F.2d 693 (1st Cir.1987), the plaintiff's FELA complaint alleged that his employer's negligent harassment caused emotional distress with attendant physical symptoms. The First Circuit upheld the trial court's grant of summary judgment to the defendant concluding that Moody had failed to present sufficient evidence of causation. The court opted against exploring the possibility of recovery under the FELA for emotional injuries unaccompanied by physical injury which *Buell* signaled.

The plaintiff's FELA claim in *Holliday v. Conrail*, 914 F.2d 421 (3d Cir.1990), *cert. denied*, ____ U.S. ____, 111

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[3] Bystander liability is the recovery of damages for witnessing the death or injury to another without significant injury or fear to the witness. *Gaston*, 866 F.2d at 817 n. 1.

S.Ct. 970, 112 L.Ed.2d 1057 (1991), alleged that his employer negligently assigned him to a position for which he was unqualified, that he made several errors and was almost killed, and that as a result he suffered emotional injuries with physical manifestations. Rather than apply a negligence standard to the facts of the case the Third Circuit assessed Holliday's claim in an *ad hoc* manner, focusing on the "nature of his injury and the character of the tortious activity." *Id.* at 423 (brackets omitted) (quoting *Buell*, 107 S.Ct. at 1417). The court upheld the grant of summary judgment in favor of the defendant finding that the "allegedly tortious activity ... was simply an ordinary management decision and was not of such a character that [the employee's] emotional reaction and related physical consequences constituted an 'injury' compensable under the FELA." *Id.* at 425. By emphasizing the narrowness of its opinion and its fact-specific basis, the majority opinion took care to reflect that it was not deciding whether recovery for purely emotional injuries is permitted under the FELA.[4]

Similarly, the plaintiff in *Elliott v. Norfolk & Western Ry. Co.*, 910 F.2d 1224 (4th Cir.1990), based her FELA claim on allegations that her employer's mistreatment had resulted in emotional distress. In upholding summary judgment for the defendant the Fourth Circuit found that the plaintiff had failed to make a sufficient showing of unconscionable abuse or outrageous conduct, deemed an essential element of her claim. The court expressly declined to decide "whether one may recover under the FELA for purely emotional injuries without additional physical symptoms...." *Id.* at 1229.

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[4] Judge Mansmann dissented because he was convinced that "as a matter of law that the FELA permits a recovery for emotional distress" *Id.* at 427.

Meanwhile, in *Adkins v. Seaboard Sys. R.R.*, 821 F.2d 340 (6th Cir.), *cert. denied*, 484 U.S. 963, 108 S.Ct. 452, 98 L.Ed.2d 392 (1987), the plaintiff's FELA action alleged the intentional infliction of emotional distress resulting from a threatened discharge for insubordination. The Sixth Circuit distinguished *Buell* on the ground that it referred only to negligent conduct giving rise to an FELA claim and held "that this claim of an intentional tort resulting in a purely emotional injury is not cognizable under the FELA." *Id.* at 342. Whether the Sixth Circuit would likewise bar an FELA claim for the negligent infliction of emotional distress was left open in *Adams v. CSX Transp., Inc.*, 899 F.2d 536 (6th Cir.1990). Adams claimed the negligent infliction of emotional distress by his employer's failure to provide an emotionally safe workplace, leading to a severe depression which required hospitalization. The Sixth Circuit upheld the magistrate judge's ruling in favor of the defendant on the ground that Adams failed to establish either the breach of the employer's duty to provide an emotionally safe workplace or the foreseeability of the emotional injury. The court expressly stated that it was not deciding whether there might be recovery for a purely emotional injury under the FELA.[5] *See also Stoklosa v. Conrail*, 864 F.2d 425, 426 (6th Cir.1988) ("We leave for another day the question of whether negligent infliction of emotional distress resulting in emotional injury with no verifiable physical manifestation is actionable under FELA.").

Finally, the circuit roundup includes the decisions by the Seventh Circuit. In *Hammond v. Terminal R. Ass'n.*, 848 F.2d 95 (7th Cir.1988), *cert. denied*, 489 U.S. 1032, 109 S.Ct. 1170, 103 L.Ed.2d 229 (1989), that court reiterated its

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[5] Citing *Buell* and *Netto*, the Sixth Circuit held that the duty to provide an emotionally safe workplace is breached by unconscionable abuse. 899 F.2d at 539-40.

pre-*Buell* position that "the FELA does not create a cause of action for tortious harms brought about by acts that lack any physical contact or threat of physical contact." *Id.* at 96. This position was reaffirmed in *Gillman v. Burlington N.R.R. Co.*, 878 F.2d 1020 (7th Cir.1989). Gillam invoked the FELA, alleging an emotional injury resulting from an accident in which a co-worker was killed. The trial court indicated that this cause of action was permitted under the FELA but dismissed the complaint because it failed to state a claim for negligent infliction of emotional distress under Illinois law. The Seventh Circuit affirmed on that basis and opted not to decide whether an action for negligent infliction of emotional distress, unaccompanied by physical contact or the threat of physical contact, is cognizable under the FELA.

Excepting our colleagues in the Ninth Circuit, our circuit brethren have indicated a reluctance to field the *Buell* pitch. We end that reluctance today, persuaded that an emotional injury can be every bit as harmful, debilitating, and destructive of the quality of one's life as a physical injury. We therefore hold that a claim for an emotional injury caused by emotional distress negligently inflicted, even without an accompanying physical injury or physical contact, is cognizable under the FELA. Now we must articulate a rubric to govern the recovery for such claims, no mean task.

The New Rubric

[2] The Supreme Court suggested an examination of the common law in our quest for guidance. We find no universal rule with which to assess the negligent infliction of emotional injury. The states essentially employ four basic paradigms: (1) physical injury or impact; (2) zone of danger; (3) bystander; and (4) full recovery. Comment, *A*

New Tort California: Negligent Infliction of Emotional Distress (For Married Couples Only), 41 Hastings L.J. 447 (1990) (hereinafter *A New Tort*).

The physical injury or impact rule permits recovery for emotional injury provided there is some physical contact. The ostensible justification for this requirement is that it affords a semblance of a guarantee that the mental injury is genuine. *Restatement (Second) of Torts* § 436 A comment b (1965); W. Keeton, *Prosser and Keeton on Torts* 363 (5th ed. 1984). It provides a bright line basis for recovery for an emotional injury. This rule has been criticized however, as being arbitrarily underinclusive for there are genuine mental injuries that are not accompanied by a physical injury or impact.[6] *Buell*, 480 U.S. at 569 n. 18, 107 S.Ct. at 1417 n. 18 ("The American Law Institute urges that as long as the distress is 'genuine and severe,' bodily harm should not be required."); Bell, *The Bell Tolls: Toward Full Tort Recovery for Psychic Injury*, 36 U.Fla.L.Rev. 333, 337 (1984) (hereinafter *The Bell Tolls*).

The zone of danger doctrine provides for the recovery for emotional injuries resulting from the witnessing of peril or harm to another if the plaintiff is also threatened with physical harm as a consequence of the defendant's negligence. While this rubric permits recovery in some instances excluded by the physical injury or impact rule, it nevertheless suffers from the same basic failing: it excludes recovery by persons suffering a genuine emotional injury. The arbitrary nature of this rule is best illustrated by the circumstance that the difference of a handful of inches may

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[6] In reaction to the harsh and seemingly arbitrary exclusion of such genuine claims, some courts have gone to extraordinary lengths to find an "injury" or "impact" to compensate deserving plaintiffs. Bell, *The Bell Tolls: Toward Full Tort Recovery for Psychic Injury*, 36 U.Fla.L., Rev. 333, 337 (1984).

determine compensation for emotional distress. *A New Tort, supra.* Further the rule conditions recovery upon a person's fear for one's own safety whereas the true cause for the emotional distress might be seeing another injured or killed.

The bystander proximity rule permits recovery, even if one is not in the zone of danger, provided the complainant: (1) is physically near the scene of the accident; (2) personally observes the accident; and (3) is closely related to the victim. *Dillon v. Legg,* 68 Cal.2d 728, 441 P.2d 912, 69 Cal.Rptr. 72 (1968). While this rule provides a broader scope of recovery than the zone of danger test, it employs a set of restrictions that are not directly related to what should be the dispositive issue, *i.e.,* whether the person has in fact suffered an emotional injury caused by the negligence of another. As a consequence, the bystander proximity rule denies recovery to persons sustaining genuine emotional injury. Pearson, *Liability for Negligently Inflicted Psychic Harm: A Response to Professor Bell,* 36 U.Fla.L.Rev. 413 (1984).

The full recovery rule permits a general negligence cause of action for the infliction of serious emotional distress. It requires that the mental injury be evaluated according to an objective standard. The plaintiff's claimed emotional injury must result from a situation in which a reasonable person, normally constituted,[7] would not be

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[7] "Normally constituted" has been a standard determinant in pure emotional distress cases since *Rodrigues v. State of Hawaii,* 52 Haw. 156, 472 P.2d 509 (1970). We pause to note that the reasonble person by whose constitution recovery will be gauged in maritime cases is a far heartier breed than the flooded-out homeowners in *Rodrigues. Cf. Boudoin v. Lykes Bros. Steamship Co.,* 348 U.S. 336, 339, 75 S.Ct. 382, 385, 99 L.Ed. 354, 358 (1955) ("Sailors lead a rough life and are more apt to use their fists than office employees; what will seem to sedentary and protected persons an insufficient provocation for a personal encounter,

able to cope adequately with the mental distress occasioned by the circumstances. *See Prosser and Keeton on Torts* 365 n. 60; *see also Paugh v. Hanks*, 6 Ohio St.3d 72, 451 N.E.2d 759, 765 (1983).

These four standards reflect competing evaluations of three principal policy considerations limiting recovery for an emotional injury: (1) mental injury is often temporary and relatively trivial; (2) there is a danger that mental claims will be falsified; and (3) there is a perceived unfairness in imposing liability where the injury is a remote consequence of the wrongful act. *Restatement (Second) of Torts* § 436 A comment b; *Prosser and Keeton on Torts* 360-61.

Mindful of the relevance of these considerations, we are not persuaded that they should prevent recovery in all situations in which a person truly has suffered a consequential emotional injury. For as one noted commentary suggests:

> It is entirely possible to allow recovery only upon satisfactory evidence and deny it when there is nothing to corroborate the claim or to look for some guarantee of genuineness in the cir-

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Footnote 7 continued.

is not the measure of the 'disposition' of 'the ordinary men in the calling.' ") (citing *Jones v. Lykes Bros. Steamship Co.*, 204 F.2d 815, 817 (2d Cir.), *cert. denied*, 346 U.S. 857, 74 S.Ct. 72, 98 L.Ed. 370 (1953)).

Inquiry into the normal constitution of a seaman-plaintiff requires a careful and studied consideration of the nature of the work undertaken, the physical and emotional requisites for the pertinent job, the training and experience of the person involved, and the ordinary characteristics and sensibilities expected of those involved in maritime pursuits. To be excluded are those persons of such fragile or delicate psyche that their resistance to emotional stress falls below that expected of a simlarly situated seaman.

> cumstances of the case. The problem from this perspective is one of adequate proof, and it is not necessary to deny a remedy in all cases because some claims may be false. And where the concern is to avoid impossing excessive punishment upon a negligent defendant, it must be asked whether fairness will permit leaving the burden of loss instead upon the innocent victim.

Prosser and Keeton on Torts 361. *See also The Bell Tolls*, *supra*, at 351 ("Psychiatric/psychological examining techniques have increased markedly in sophistication since the advent of the physical impact, zone of danger and ensuing physical injury rules. As a result, successfully feigning a psychic injury is not an easy matter."). Consequently one who has suffered a significant emotional injury should not be denied recovery simply because the factual scenario does not satisfy some earlier-selected, fictitious method of authenticating the injury.

There need be little reminder of the mandated liberal interpretation to be ascribed to the FELA and Jones Act. *Buell*, 480 U.S. at 561-62, 107 S.Ct. at 1413-14; *Gaston*, 866 F.2d at 818. We conclude that a rule which allows recovery for true, significant mental injuries is best attuned to that mandate.[8] Having so stated, we remain vitally aware that seamen and railroaders have chosen callings that "involve braving certain hazards [which] are traditionally not well suited to the squeamish or faint hearted." *Gaston*, 866 F.2d at 820. In evaluating claims of emotional injury, courts must attribute to those who choose these callings the appropriate daring and strength and quality of character.

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[8] Today's ruling necessarily belies what we now perceive to be the myopic prognostication of *Gaston*, 866 F.2d at 819.

Applying the rubric we adopt today to the facts of the case at bar, we find that the district court appropriately dismissed the complaint. The injury complained of is not a reasonably foreseeable consequence of the alleged negligence. One would not reasonably expect a normally constituted seaman, much less a senior, very experienced tugboat captain, to have the emotional reaction alleged by Plaisance who, objectively assessed, was not threatened by the fire. Further, fires in the oilfield and the flaring of gas were not unusual sights and the other crews were not placed in significant danger. Indeed, the crews of the barge and accompanying tugboat quickly moved to the safety of Plaisance's vessel, which Plaisance placed directly against the barge without being so ordered and without comment. It was a smooth, nigh routine maneuver lasting only a few minutes. It was not until many hours later, and only after he allegedly slipped and fell on spilled fuel on his deck that Plaisance asked to be relieved. Our conclusion is buttressed by the observation of the treating psychiatrist who testified that he was baffled by Plaisance's overall reaction. We share that bafflement.

The judgment of the district court is AFFIRMED.

EDITH H. JONES, Circuit Judge, concurring and dissenting:

With this decision, the majority fashion a general negligence cause of action for infliction of serious emotional distress and have become the first court to accept the Supreme Court's "open invitation to the lower federal courts to explore the possibility of recovery under the FELA for a purely emotional injury."[1] Because this

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[1] Slip op. at 5284 (citing *Moody v. Maine C.R. Co.*, 823 F.2d 693 (1st Cir.1987)).

holding is not warranted on the facts before us, imprudently rejects all accepted limitations on emotional injury claims, and conflicts with our precedents, I respectfully dissent from its reasoning, though not from the judgment.

At the outset, it must be noted, the majority have essentially issued an advisory opinion. After finding that there is a cause of action for purely emotional injuries under the FELA and the Jones Act and detailing the analysis for such claims, the majority reject Plaisance's claim because the "injury complained of is not a reasonably foreseeable consequence of the alleged negligence." Because Plaisance failed to establish the *prima facie* elements of any negligence claim, no matter how broadly drawn, it would have been better not to decide whether emotional distress damages are under other circumstances compensable.

The majority have detailed the relevant decisions of this and other circuits, and I will not duplicate their efforts. It suffices to observe that all except the Ninth Circuit have treated emotional injury claims with circumspection. Two of the circuits have rejected claims for emotional injury unaccompanied by physical impact or a threat of impact; one circuit is dubious about it; and only the Ninth stands

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Footnote 1 continued.

The Ninth Circuit was the first circuit court to recognize a claim under the FELA for purely emotional injuries in *Atchison, T. & S.F.R. Co. v. Buell*, 771 F.2d 1320 (9th Cir.1985), the case underlying the Supreme Court's "open invitation" to the lower federal courts to explore such claims. Bound by its own precedent, the Ninth Circuit continues to recognize such claims. *See Taylor v. Burlington Northern R. Co.*, 787 F.2d 1309, 1313 (9th Cir.1986). The majority opinion, however, is the first opinion after *Buell*, 480 U.S. 557, 107 S.Ct. 1410, 94 L.Ed.2d 563 (1987), to recognize an emotional distress claim under the FELA and the Jones Act.

by a purely emotional injury FELA claim.[2] Our own circuit has cabined this type of claim.[3] *Gaston v. Flowers*, 866 F.2d 816 (5th Cir.1989); *see also Hagerty v. L & L Marine Serv., Inc.*, 788 F.2d 315 (5th Cir.1986).

In *Gaston.* this court refused to construe the FELA to cover bystander injuries. *Id.* at 819. The court explained that because bystander recovery would vastly increase employers' exposure to damages based on random factors that are unrelated to the safe operation of a train or vessel, for example, how many crew members observe an accident, whether their vision is obscured by darkness or weather, or how close they are to the accident scene, such liability would not advance a major purpose of the FELA and the Jones Act—providing employers with incentives to reduce dangers and to operate safely. *Id.* at 820. As *Gaston* observed, allowing bystander recovery could create potentially ruinous liability for employers.

Here, the majority's analysis of emotional distress

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[2] *Gaston*, 866 F.2d at 818-19 (citing *Adkins v. Seaboard System R.R.*, 821 F.2d 340 (6th Cir.1987) (rejecting FELA claim for intentional infliction of emotional distress and hinting that it might also reject a claim for negligent infliction of emotional distress); *Hammond v. Terminal R.R. Assoc. of St. Louis*, 848 F.2d 95 (7th Cir.1988) (rejecting recovery for emotional injury without physical contact); *Moody v. Marine Central R.R. Co.*, 823 F.2d 693 (1st Cir.1987) (observing that its pre-*Buell* holding refusing recovery for purely emotional injury might now be in doubt); *Taylor v. Burlington Northern R.R. Co.*, 787 F.2d 1309 (9th Cir.1986) (holding employer liable for plaintiff's emotional injury).

[3] Although the *Hagerty* court purported to reject the physical impact/injury requirement for recovery for emotional injuries, that holding was later deemed dicta and the necessity of physical impact or injury for recovery remains an open question. *See Gaston v. Flowers*, 866 F.2d 315 (5th Cir.1989) ("While the *Hagerty* court did observe that a Jones Act recovery was possible without physical impact, that statement was necessarily dictum; for Mr. Hagerty *did* suffer impact, having been drenched with cancer-causing chemicals.").

claims would allow bystanders to recover for emotional injuries if a "reasonable person, normally constituted, would not be able to cope adequately with the mental distress occasioned by the circumstances" that he witnessed. Applying the majority's analysis to the facts of *Gaston* would lead to a different result. Gaston witnessed his half-brother's death. He tried but failed to pull his half-brother to safety as he was crushed between two ships. After this traumatic event, it is quite likely that a reasonable person would not be able to cope adequately with the ensuing mental distress. Yet *Gaston* denied the plaintiff's emotional distress claim.

The majority wave away the inconsistency between today's ruling and *Gaston* by calling the earlier precedent a "myopic prognostication." A more convincing explanation is demanded to escape the force of binding circuit precedent, yet the majority make no attempt to distinguish or limit *Gaston*. By rejecting bystander recovery, *Gaston* implicitly held that this court must analyze emotional distress claims under a standard at least as restrictive as the zone-of-danger test, which requires that the plaintiff be personally endangered.

Finally, even if this issue were properly before us and the majority's holding did not untenably overrule *Gaston*, I would differ with their analysis because it departs from the great weight of authority partly designed to prevent feigned claims of emotional injury. *See Restatement (Second) of Torts* § 436 A (1965) (negligent acts that result in purely emotional injuries are not a source of liability); W. Prosser & W. Keeton, *The Law of Torts*, § 54 (5th ed. 1984).

The majority's opinion sets forth the common-law approaches to emotional distress claims—physical impact or injury, zone-of-danger, and bystander recovery—but

then rejects these "earlier-selected, fictitious method[s] of authenticating [emotional] injury," as arbitrary tests that prevent recovery in cases of genuine and serious injury. In place of the accepted common-law rules, the majority adopts the "full recovery rule," which allows a "general negligence cause of action for the infliction of serious emotional distress ... evaluated according to an objective standard."[4]

The majority adopted their standard from *Rodrigues v. State*, 52 Haw. 156, 173, 472 P.2d 509, 520 (1970), the first case to allow a general negligence action for emotional distress.[5] Only Hawaii, California, and a minority of other states allow this cause of action. *See* W. Prosser & W. Keeton, *supra*, § 54 at 364-65. The majority of courts compensate emotional distress claims provided the mental distress can be authenticated by some physical injury, illness or other objective physical manifestation. *See id.* at

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[4] The majority holding is not expressly limited to negligent infliction of emotional distress claims, and its definition of the full recovery rule could be construed to encompass claims for the intentional infliction of emotional distress. However, the Plaisances' emotional distress claim is based solely upon a negligence theory and the issue of intentional infliction of emotional distress is not presented in this appeal. If the majority opinion is intended to cover intentional claims, I would have another reason to disent.

[5] In *Rodrigues*, the court held that the plaintiffs were entitled to damages for the emotional distress they suffered after the State negligently failed to clear a drainage culvert and their house was flooded. In *Campbell v. Animal Quarantine Station, Etc.* 63 Haw. 557, 560, 632 P.2d 1066, 1068 (1981), the court applied *Rodrigues* to the plaintiffs' claim for the emotional distress they suffered when their dog died because of the defendants' negligence. The court held that the plaintiffs could recover for their emotional distress even if they did not witness the tortious event, or introduce medical testimony to substantiate their claims of serious emotional distress. *Id.* at 562, 632 P.2d at 1069.

364 & cases cited in n. 55.[6] "[C]ases will obviously be infrequent in which 'mental disturbance,' not so severe as to cause physical harm, will clearly be a serious wrong worthy of redress and sufficiently attested by the circumstances of the case." *Id.* at 362; *see also Restatement (Second) of Torts* § 436(1) and (2) (1965) (negligent conduct that causes bodily harm solely through emotional disturbances, without physical contact, may be a basis for liability).

One may sympathize with the generous spirit that prompts the majority to recognize the potential genuineness and severity of some emotional injury claims. To acknowledge their existence is not, however, to establish a principled framework for recovery. The majority's "rule" involving the "reasonable able-bodied seaman" is not so much that as an open invitation to creative pleading. Most of the circuits, apparently realizing the slipperiness of such claims, and their proneness to triviality or falsity, have so far wisely declined to bring such claims within the scope of FELA and the Jones Act. *Gaston*, cavalierly treated by the majority, placed limits on such claims. To top it off, Plaisance, having fathered an incredibly broad expansion of liability, will get no benefit from it himself—an ironic twist to a compensation-oriented opinion. This is no way to run a railroad.

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[6] A growing number of court no longer require physical manifestations of emotional distress for recovery. *See Corgan v. Muehling*, 1991 W.L. 90376, 143 Ill.2d 296, ___ Ill.Dec. ___, ___ N.E 2d ___ (Ill.1991); *Folz v. State*, 110 N.M. 457, 797 P.2d 246 (1990); *St. Elizabeth Hospital v. Garrard*, 730 S.W.2d 649 (Tex.1987); *Gates v. Richardson*, 719 P.2d 193 (Wyo.1986). *But see Hancock v. Northcutt*, 808 P.2d 251 (Ala.1991); *Reilly v. United States*, 547 A.2d 894 (R.I.1988); *Cunningham v. Lockard*, 48 Wash.App. 38, 736 P.2d 305 (1987).

APPENDIX D

Mr. & Mrs. Henry PLAISANCE, Jr.
Plaintiffs-Appellants,

v.

TEXACO, INC. et al.,
Defendants-Appellees.

No. 90-3183.

United States Court of Appeals,
Fifth Circuit.

Feb. 11, 1992.

Appeal from the United States District Court for the Eastern District of Louisiana, A.J. McNamara, Judge.

(Opinion August 9, 1991, 5 Cir., 1991, 937 F.2d 1004)

Before POLITZ, Chief Judge, KING, GARWOOD, JOLLY, HIGGINBOTHAM, DAVIS, JONES, SMITH, WIENER, BARKSDALE, E. GARZA and DeMOSS, Circuit Judges.*

BY THE COURT:

A majority of the Judges in active service, on the Court's own motion, having determined to have this case reheard en banc,

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*Judge Duhe is recused, and therefore did not participate in this decision.

IT IS ORDERED that this case shall be reheard by the Court en banc with oral argument on a date hereafter to be fixed. The Clerk will specify a briefing schedule for the filing of supplemental briefs.

APPENDIX E

Mr. & Mrs. Henry PLAISANCE, Jr.
Plaintiffs-Appellants,

v.

TEXACO, INC. et al.,
Defendants-Appellees.

No. 90-3183.

United States Court of Appeals,
Fifth Circuit.

July 14, 1992.

Tugboat captain and spouse brought action against employer and tug charterer to recover under Jones Act and general maritime law for emotional injury that resulted from witnessing fire. The United States District Court for the Eastern District of Louisiana, A.J. McNamara, J., 735 F.Supp. 686, dismissed claims. Captain and spouse appealed. The Court of Appeals, 937 F.2d 1004, affirmed. Rehearing en banc was granted, 954 F.2d 266. The Court of Appeals, W. Eugene Davis, Circuit Judge, held that captain's posttraumatic stress disorder was not a reasonably foreseeable consequence of negligence, and therefore, was not compensable.

Affirmed.

Politz, Chief Judge, specially concurred and filed opinion joined by Jerre S. Williams, Circuit Judge.

Appeal from the United States District Court For the Eastern District of Louisiana.

Before POLITZ, Chief Judge, WILLIAMS, KING, GARWOOD, JOLLY, HIGGINBOTHAM, DAVIS, JONES, SMITH, WIENER, BARKSDALE, EMILIO M. GARZA, DeMOSS, Circuit Judges.

W. EUGENE DAVIS, Circuit Judge:

Henry A. Plaisance, Jr. and his wife appealed the dismissal of their action under the Jones Act and general maritime law to recover for emotional injuries unaccompanied by any physical injury. A panel of this court held that the Jones Act allows recovery for purely emotional injuries but affirmed the dismissal of the Plaisances' claim. Upon rehearing en banc, we affirm dismissal of the suit but hold that the facts of this case make it unnecessary for us to decide whether the Jones Act permits recovery for purely emotional injuries.

I.

In January 1989, Mr. Plaisance, a tugboat captain with over thirty years of experience, was operating the tug TOMMY CROSBY for his employer, Crosby Marine Service, Inc. (Crosby). The tug was chartered to Texaco, Inc. At the time, the TOMMY CROSBY was towing a workover barge from one well site to another in Louisiana coastal waters. A second tug, the VERGIE CENAC was tied to the stern of the barge. While this flotilla was en route to a new well, one of the barge's spuds, projecting below the waterline, struck an underwater gas pipeline. The pipeline ruptured, causing gas to escape and an explosion and fire to ensue.

Following the explosion, fire broke out on the rear of the barge and the front of the VERGIE CENAC. Mr. Plaisance backed the TOMMY CROSBY to the bow of the barge, and the crews from the barge and the VERGIE CENAC boarded the TOMMY CROSBY to escape the fire. The tow was then disconnected, and Mr. Plaisance moved the TOMMY CROSBY a short distance away from the barge. The tether lines between the barge and the VERGIE CENAC burned, and the VERGIE CENAC drifted away from the ruptured site. Upon instructions from a Texaco supervisor, Mr. Plaisance reconnected the tow lines to the barge, pulled it away from the ruptured site, and spudded it in place.

The crews from the flotilla and other vessels that had responded to the fire extinguished the fire in less than thirty minutes. Mr. Plaisance did not personally participate in fighting the fire. The explosion did not damage the TOMMY CROSBY, and the fire did not spread to it from the barge or the other tug. Mr. Plaisance was never in danger and, fortunately, no one was injured by the fire.

After the fire was extinguished, the flotilla reformed and proceeded to a nearby Texaco camp. The TOMMY CROSBY then continued on to a Texaco fuel dock in the vicinity to receive a load of diesel fuel for the barge. Once the tug transferred the fuel to the barge, the TOMMY CROSBY towed the barge to a repair dock in Cocodrie, Louisiana. Upon his arrival at the repair dock, Mr. Plaisance told a Texaco representative that he did not feel well and asked to be relieved of duty.

Later that day, Mr. Plaisance went to a local hospital where he was treated for several days. He then transferred to a psychiatric hospital where he received treatment for an extended period of time. According to the treating

psychiatrist, Mr. Plaisance was suffering from post-traumatic stress disorder because of his belief that he or someone else could have been killed in the explosion and fire. Mr. Plaisance has continued to receive periodic psychiatric care since his release from the hospital. He contends that he has not been able to return to work.

Mr. Plaisance and his wife later filed this personal injury suit against Crosby under the Jones Act, 46 U.S.C.App. § 688, and general maritime law and against the vessel charterer, Texaco, under the general maritime law. Crosby and Texaco moved for dismissal or summary judgment on all claims on grounds that purely emotional injuries are not cognizable under the Jones Act or general maritime law. The district court granted the motion and dismissed the Plaisances' suit. See *Plaisance v. Texaco, Inc.*, 735 F.Supp. 686 (E.D.La.1990).

On appeal, a panel majority of this court affirmed the district court's dismissal. See *Plaisance v. Texaco, Inc.*, 937 F.2d 1004 (5th Cir.1991). Despite its conclusion, the panel majority adopted the so-called full recovery rule for this circuit for the recovery of emotional injuries. Under this rule, recovery is permitted in a negligence action for infliction of serious emotional distress where "a reasonable person, normally constituted, would not be able to cope adequately with the mental distress occasioned by the circumstances." *Id.* at 1010.

The panel majority concluded, however, that the Plaisances were not entitled to recover because Mr. Plaisance's injury "was not a reasonably foreseeable consequence of the alleged negligence." *Id.* The panel majority reasoned that one would not expect a seaman with Mr. Plaisance's experience to suffer such an emotional reaction when he was not objectively threatened by the fire. We

took this case en banc to consider whether its facts were appropriate ones for us to establish a rule for the recovery of purely emotional injuries under the Jones Act.

II.

A.

The panel majority fairly describes the various models that have been adopted or proposed by the states for recovery of emotional injuries. These four theories, in decreasing order of difficulty for a plaintiff to establish, are:

> (1) physical injury or impact rule: permitting "recovery for emotional injury provided there is some physical contact;"
>
> (2) zone of danger rule: providing recovery for emotional injuries absent any physical contact, which result "from the witnessing of peril or harm to another if the plaintiff is also threatened with physical harm as a consequence of the defendant's negligence;"
>
> (3) bystander proximity rule: permitting "recovery, even if one is not in the zone of danger, provided the complainant: (1) is physically near the scene of the accident; (2) personally observes the accident; and (3) is closely related to the victim;" and
>
> (4) full recovery rule: allowing recovery in a negligence action for infliction of serious emotional distress where "a reasonable person, normally constituted, would not be able to cope adequately with the mental distress occasioned by the circumstances."

Plaisance, 937 F.2d at 1009-10.

We agree with the panel that Mr. Plaisance's injury was not a reasonably foreseeable consequence of the defendants' negligence. Thus, under any known theory of recovery—even the most liberal—the Plaisances have failed to establish their claim. Stated differently, the Plaisances have not presented a prima facie case to recover any damages arising from this incident. Consequently, we conclude that the facts of today's case do not permit us to decide whether or under what circumstances we might permit recovery of damages for purely emotional injuries. Other circuit courts have similarly resisted adopting a general rule of recovery for purely emotional injuries in cases where the plaintiff has failed to present a prima facie case. *See, e.g., Outten v. National R.R. Passenger Corp.*, 928 F.2d 74 (3d Cir.1991); *Stoklosa v. Consolidated Rail Corp.*, 864 F.2d 425 (6th Cir.1988).

B.

To avoid any possible confusion that our decision to review this case en banc may cause, we emphasize that *Gaston v. Flowers Transp.*, 866 F.2d 816 (5th Cir.1989), continues to represent the law of this circuit. In *Gaston*, a seaman brought suit under the Jones Act for purely emotional injuries he allegedly suffered when he saw his half-brother crushed to death between two vessels. A panel of this court affirmed the district court's dismissal of Gaston's action. The court reasoned that construing the Jones Act to cover a *bystander's* injuries would represent a major departure from the existing jurisprudence. The court recognized that such a move would require it to allow recovery for injuries resulting not from physical trauma, or the fear of physical trauma, to the plaintiff but from witnessing a "bad sight," i.e., harm to another. *Id.* at

819-20.

The holding in *Gaston* is limited but instructive. The court recognized that a plaintiff suing for purely emotional injuries could recover if he also suffered physical injury. The court also determined that a bystander could not recover for merely witnessing harm to another where the plaintiff suffered no harm or threat of harm. In rejecting bystander recovery, *Gaston* implicitly foreclosed recovery under any less exacting model, such as a full recovery theory. *Gaston* leaves open the question whether a plaintiff may recover for purely emotional injuries under a zone of danger theory.

III.

For the reasons stated above, we affirm the judgment of the district court.

AFFIRMED.

POLITZ, Chief Judge, with whom JERRE S. WILLIAMS, Circuit Judge, joins, specially concurring:

I join in the judgment of the court. I do not agree with the majority, however, that in the resolution of this case it is "unnecessary for us to decide whether the Jones Act permits recovery for purely emotional injuries," without physical injury or contact. I believe such to be an imperative for that is the entirety of the Plaisance claim. He seeks recovery solely for emotional injuries arising out of an occurrence which happened to him. He claims no physical injury. I would reach and decide whether purely emotional injuries are recoverable under the Jones Act. In doing so I would again conclude, as did the majority of the

panel, *Plaisance v. Texaco*, 937 F.2d 1004 (5th Cir.1991), that such an injury may serve as the basis for recovery under the FELA and Jones Act.